

Before the
Federal Communications Commission
Washington, D.C. 20554

MAILED

JUN 29 2007

FCC

In the Matter of)	
Amendment of Section 73.202(b))	MB Docket No. 05-67
Table of Allotments,)	RM-11116
FM Broadcast Stations.)	RM-11342
(Fishers, Lawrence, Indianapolis and)	
Clinton, Indiana))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 27, 2007

Released: June 29, 2007

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the *Notice of Proposed Rule Making and Order To Show Cause* ("Notice")¹ issued in response to a Petition for Rule Making jointly filed by Indy Lico, Inc., licensee of FM Station WWFT, Fishers, Indiana, and by WFMS Lico, Inc., licensee of FM Station WFMS, Indianapolis, Indiana ("Petitioners"). The *Notice* included an *Order to Show Cause* directed to Word Power, Inc. ("Word Power"), licensee of Station WPFR-FM, operating on Channel 230A, Clinton, Indiana. Word Power filed a Counterproposal as part of a pleading captioned "Response to Order to Show Cause, Comments and Counterproposal" ("Counterproposal"). Indiana Community Radio Corporation ("ICRC"), licensee of FM Translator Station W230AR, Channel 230, New Castle, Indiana, also filed a Counterproposal. Petitioners filed Comments, Reply Comments, and a Reply to Word Power's Counterproposal.² As explained below, we grant Petitioners' Petition for Rule Making and dismiss the two referenced Counterproposals as unacceptable for consideration.

¹ *Fishers, Lawrence, Indianapolis, and Clinton, Indiana*, Notice of Proposed Rule Making and Order to Show Cause, 20 FCC Rcd 4303 (MB 2005).

² ICRC filed a pleading entitled "Request for Expedited Processing of Counterproposal" (the "ICRC Request"). The ICRC Request contained no service list. Since only one known copy of the pleading was received by the Commission, this pleading was assumed to be an impermissible *ex parte* presentation. Therefore, the staff served all parties to MB Docket No. 05-67 with this pleading, thus making the pleading a part of this docket. All parties were afforded fifteen (15) days from the date of being served with the ICRC Request to comment on that request. The chief allegation in the ICRC Request was that Station WWFT had operated with Class B1 facilities on Channel 230, as proposed in this docket, rather than in accordance with its authorized Channel 230A facilities, over a period of several months in 2006. In response to the ICRC Request, Indy Lico, Inc. stated that it has never operated Station WWFT with Class B1 facilities. ICRC filed a Response which included a few examples of alleged Station WWFT interference to the radio signals of Station WPFR-FM and to ICRC's Translator Station W230AR. In ICRC's Request and Response, only Martin Hensley's statements in the Response were supported by a declaration under penalty of perjury. Most of Mr. Hensley's statements were his opinions of interference complaints made by other people. We find that ICRC's statements fail to raise a substantial and material question regarding Indy Lico, Inc.'s qualifications to be a licensee and are otherwise not material to the resolution of this proceeding.

2. **Background.** The *Notice* proposed the upgrade of Channel 230A, Station WWFT, Fishers, Indiana, to Channel 230B1, the reallocation of Channel 230B1 from Fishers to Lawrence, Indiana, as Lawrence's first local aural transmission service, and the modification of Station WWFT's license accordingly. In order to maintain local service at Fishers, the *Notice* proposed to reallocate Channel 238B, Station WFMS, from Indianapolis to Fishers, Indiana, and to modify Station WFMS's license accordingly. To accommodate the reallocation of Channel 230B1 to Lawrence, the *Notice* proposed to substitute Channel 229A for Channel 230A at Station WPFR-FM, Clinton, Indiana, and to modify Station WPFR-FM's license accordingly (RM-11116). In addition, the *Notice* included an *Order to Show Cause* directed to Word Power, the licensee of Station WPFR-FM, requesting that licensee to show cause why its license should not be modified to specify operation on Channel 229A in lieu of Channel 230A at Clinton, Indiana.

3. **Counterproposals.** In response to the *Notice*, we received two Counterproposals. In its Counterproposal, ICRC claims that grant of the Petitioners' proposal will cause its FM Translator Station W230AR to cease operation.³ To prevent such an outcome, ICRC proposes to change the class designation of its translator station from Class D to Class A on Channel 248A at Thornton, Indiana, pursuant to Section 73.512 of the Commission's Rules. ICRC's proposal is defective for two reasons. First, ICRC has not filed a pleading that qualifies as a counterproposal. A counterproposal is defined as a "proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made."⁴ ICRC's proposal is not mutually exclusive with Petitioners' proposal in this proceeding. Rather, ICRC is attempting to move its translator station to a channel that will not be mutually exclusive with Petitioners' proposal to operate on Channel 230B1 at Lawrence, Indiana. ICRC may file an application to move to a new channel pursuant to Section 74.1233(a)(1) of our Rules,⁵ but such an application is not appropriately filed in this proceeding. Second, the Section 73.512 channel change procedures on which ICRC relies are limited to Class D noncommercial educational (NCE) FM stations. Accordingly, ICRC's reliance on this rule to propose a new channel for an FM translator station is misplaced.⁶ Third, the Commission's Rules provide no basis to modify a translator authorization to specify a full-service station. In light of the foregoing defects, we have determined that ICRC's Counterproposal must be dismissed as unacceptable for consideration because it was not substantially complete or technically correct at the time of its filing.⁷ If ICRC wishes to change

³ FM translators are secondary services and will not be permitted to continue operation if they cause any interference to broadcast stations, which are primary services. See 47 C.F.R. § 74.1203(a).

⁴ See *Implementation of BC Docket 80-90 To Increase the Availability of FM Broadcast Assignments*, Memorandum Opinion and Order, 5 FCC Rcd 931, 931 n. 5 (1990).

⁵ See 47 C.F.R. § 74.1233(a)(1).

⁶ See generally, 47 C.F.R. § 74.1201(a).

⁷ See, e.g., *Broken Arrow and Bixby, Oklahoma*, Memorandum Opinion and Order, 3 FCC Rcd 6507, 6511 (MMB 1988); *Springdale, Arkansas, Carthage et al., Missouri*, Memorandum Opinion and Order, 5 FCC Rcd 1241 (MMB 1990).

the operating channel of its translator station to avoid interference with our grant of Station WWFT's request to increase its facilities and move to Lawrence, Indiana, ICRC should file an appropriate application pursuant to Subpart L of Part 74 of the Commission's Rules concerning FM Broadcast Translator Stations and FM Broadcast Booster Stations.⁸

4. Word Power's Counterproposal is defective. Word Power proposes to reallocate Channel 230A, Station WWFT, from Fishers to Lawrence at a new transmitter site and modify the license of Station WWFT accordingly. Word Power cannot propose an involuntary site change and a lower class of channel than what was proposed by Indy Lico, Inc., the licensee of Station WWFT, because Word Power is not the licensee of Station WWFT and Indy Lico, Inc., has not consented to such a site change or to reallocate its Channel 230A to Lawrence. Further, Word Power proposes that Channel 238B, Station WFMS, Indianapolis, Indiana, be reallocated from Indianapolis to Fishers, Indiana. Word Power has presented no evidence that the licensee of Station WFMS has consented to reallocate its Channel 238B from Indianapolis to Fishers, Indiana, in connection with Word Power's Counterproposal. Under well established policy, the Commission will not force an existing station to change its transmitter site or its community of license.⁹ Therefore, in light of the foregoing defects, Word Power's Counterproposal is dismissed as unacceptable for consideration because it was not substantially complete or technically correct at the time of its filing.¹⁰ Further, we observe that the Commission's Rules do not protect Station WPFR-FM's signal from interference outside its 60 dBu contour.¹¹ Claims of actual interference are not cognizable as long as the required distance separation requirements between stations are met.¹² In addition, Word Power has not presented any compelling reasons in its "Response to Order to Show Cause, Comments and Counterproposal" for not substituting Channel 229A for Channel 230A at Station WPFR-FM, Clinton, Indiana, as requested in Petitioners' proposal.

5. Since both Counterproposals are subject to dismissal, Petitioners' original proposal is now the only proposal before us. Petitioner made the request to upgrade Channel 230A, Fishers, Indiana, to Channel 230B1 and to reallocate Channel 230B1 to Lawrence, Indiana, pursuant to Section 1.420(i) of the

⁸ ICRC has also referred to a recent grant of an application to change the channel of low power FM Station WIUX-LP, Bloomington, Indiana (File No. BPL-20070314ABQ). That application was granted pursuant to Subpart G of Part 73 of the Commission's Rules concerning Low Power FM Broadcast Stations (LPFM), which is not applicable to ICRC's current desire to change the operating channel of its Translator Station W230AR.

⁹ See, e.g., *Parker, Arizona*, Report and Order, 17 FCC Rcd 9578, 9579 (MB 2002), and cases cited therein.

¹⁰ See the cases cited in note 7, *supra*.

¹¹ See Sections 73.207 and 73.209 of the Commission's Rules. 47 C.F.R. §§ 73.207 and 73.209. See also *Cordele, Georgia, et al.*, Report and Order, 12 FCC Rcd 9777, 9780 (MMB 1997).

¹² *Id.*

Commission's rules,¹³ which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹⁴ In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments.¹⁵

6. In this instance, the proposed upgrade of Channel 230A to Channel 230B1 and the reallocation of Channel 230B1 from Fishers to Lawrence will allow the establishment of a first local transmission service at Lawrence, Indiana, a Census Designated Place with a 2000 U.S. Census population of 38,915 persons. Notwithstanding the fact that both Fishers and Lawrence are located within the Indianapolis, Indiana, Urbanized Area, and a *Tuck*¹⁶ showing would not be required, Petitioners have provided an acceptable *Tuck* analysis¹⁷ to demonstrate that Lawrence is a separate entity from Indianapolis.

7. In light of all the relevant factors in this case, we find that upgrading Station WWFT's channel from Channel 230A to 230B1 and reallocating Channel 230B1 from Fishers to Lawrence, Indiana; reallocating Channel 238B from Indianapolis to Fishers, Indiana; and substituting Channel 229A for Channel 230A at Clinton, Indiana, would serve the public interest. We note that allocating Channel 230B1 to Lawrence would not deprive Fishers of its sole local transmission outlet, because Channel 238B, Station WFMS, will be reallocated from Indianapolis, Indiana, to Fishers, Indiana. Thus, provision of a first local service to Lawrence under priority (3) of the FM allotment priorities is preferable to merely maintaining first local service at Fishers, which falls under priority (4) of the FM allotment priorities.

¹³ 47 C.F.R. § 1.420(i). Under our recently adopted rule changes in MM Docket No. 05-210, *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006), FM change of community requests should now be made pursuant to Section 73.3573 of the Commission's Rules.

¹⁴ See *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990).

¹⁵ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 448 (1983).

¹⁶ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988); see also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C.Cir. 1951) and *RKO General, Inc.*, 5 FCC Rcd 3222 (1990).

¹⁷ Petitioners have argued that because Lawrence and Fishers are located in the Indianapolis Urbanized Area, no *Tuck* analysis is required, citing *East Los Angeles et al., California*, Report and Order, 10 FCC Rcd 2864 (MMB 1995).

8. Consistent with the technical requirements of the Commission's Rules, Channel 230B1 can be reallocated to Lawrence, Indiana, utilizing coordinates of 39-43-37 NL and 86-03-00 WL, with a site restriction of 12.6 kilometers (7.8 miles) south of Lawrence. Additionally, Channel 238B can be reallocated from Indianapolis to Fishers, Indiana, at FM Station WFMS's presently licensed site,¹⁸ and Channel 229A can be substituted for Channel 230A at Clinton, Indiana, at FM Station WPFR-FM's presently licensed site.¹⁹

9. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective August 13, 2007, the Media Bureau's Consolidated Data Base System will reflect Channel 230B1, Lawrence, Indiana, as the reserved assignment for Station WWFT(FM) in lieu of Channel 230A, Fishers, Indiana; Channel 238B, Fishers, Indiana, as the reserved assignment for Station WFMS(FM) in lieu of Channel 238B, Indianapolis, Indiana; and Channel 229A, Clinton, Indiana, as the reserved assignment of Station WPFR-FM in lieu of Channel 230A, Clinton, Indiana.

10. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Indy Lico, Inc. for Station WWFT(FM), Fishers, Indiana, IS MODIFIED to specify operation on Channel 230B1 at Lawrence, Indiana, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

11. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of WFMS Lico, Inc., for Station WFMS(FM), Indianapolis, Indiana, IS MODIFIED to specify operation on Channel 238B at Fishers, Indiana, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

¹⁸ The coordinates for Channel 238B at Fishers are 39-46-03 NL and 86-00-12 WL. As discussed in the *Notice*, this site is short spaced to two pre-1964 "grandfathered" stations, Station WHIO-FM, Piqua, Ohio, and Station WIAU(FM), Franklin, Indiana. The third short spaced station, Station WVNI(FM), Nashville, Tennessee, initiated the short spacing to Station WFMS pursuant to Section 73.215 of the Commission's Rules. We permit Station WFMS to change its community of license because it is not changing its transmitter site, no new short-spacing would be created, and no existing short-spacing would be exacerbated, following the precedents cited in note 2 of the *Notice*.

¹⁹ The coordinates for Channel 229A at Clinton are 39-33-01 NL and 87-28-32 WL.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

12. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a), the license of Word Power, Inc. for Station WPFR-FM, Clinton, Indiana, IS MODIFIED to specify operation on Channel 229A at Clinton, Indiana, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

13. Pursuant to 47 C.F.R. Section 1.1104(3)(l), Indy Lico, Inc., licensee of Station WWFT(FM), and WFMS Lico, Inc., licensee of Station WFMS(FM), are required to submit a rule making fee in addition to the fees required for the applications to effectuate the changes in community of license for Station WWFT(FM), Channel 230A, from Fishers, Indiana to Channel 230B1, Lawrence, Indiana, and for Station WFMS(FM), Channel 238B, from Indianapolis, Indiana, to Channel 238B, Fishers, Indiana, at the time they submit their Form 301 applications.

14. IT IS FURTHER ORDERED, That the Petition for Rule Making (RM-11116) filed by Indy Lico, Inc. and WFMS Lico, Inc. IS GRANTED.

15. IT IS FURTHER ORDERED, That the Counterproposal filed by Indiana Community Radio Corporation IS DISMISSED.

16. IT IS FURTHER ORDERED, That the Counterproposal contained in the pleading entitled "Response To Order To Show Cause, Comments, and Counterproposal," filed by Word Power, Inc. IS DISMISSED.

17. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2187.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau